Nos. 90-719 and 90-733

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STEVEN IANNACONE,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

On Petition For A Writ Of Certiorari To The Superior Court Of New Jersey, Appellate Division

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DONALD HAMM,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of New Jersey

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RESPONDENT'S CONSOLIDATED BRIEF IN OPPOSITION

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March 11, 1991

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED FOR REVIEW

1. Whether the offense of drunk driving as a third offender, set forth at N.J. Stat. Ann. § 39:4-50 (West 1990)—subjecting a defendant upon conviction to imprisonment of 180 days (all of which may be served in an inpatient rehabilitation program and 90 days of which may be satisfied by the performance of community service) and a $1000 fine and the additional remedial and compensatory civil penalties of ten years license revocation, surcharges and fees—reflects a legislative determination that DWI in New Jersey is a "serious" offense, under *Blanton v. City of North Las Vegas*, 489 U.S. 538, 109 S. Ct. 1289 (1989), invoking the Sixth Amendment right to a jury trial?

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RESPONDENT'S CONSOLIDATED BRIEF IN OPPOSITION

The respondent State of New Jersey respectfully requests that this Court deny the petitions for writ of *certiorari*, seeking, respectively, review of an opinion of the Superior Court of New Jersey, Appellate Division, and an opinion of the Supreme Court of New Jersey. The opinion of the Appellate Division has not been reported and is reprinted in the appendix to the *Iannacone* petition at pp. 24a to 32a. The Supreme Court opinion is reported at 121 N.J. 109, 577 A.2d 1259 (1990), and is reprinted in the appendix to the *Hamm* petition at pp. 1a to 23a.

OPINIONS BELOW

Respondent concurs with the statements set forth in the petitions.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A. § 1257(a) (West Supp. 1990). Respondent disputes, with respect to petitioner Hamm, that 28 U.S.C.A. § 2402(b) (West 1978) is applicable because the constitutionality of a state statute has not been challenged. Respondent also disputes that petitioner Hamm timely filed his petition for a writ of certiorari but recognizes that while untimely filing is a violation of Rule 13.1 of this Court, it is probably not a jurisdictional defect as the offense is considered of quasi-criminal nature in New Jersey. 28 U.S.C.A. § 2101(c),(d) (West 1982).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution is reprinted in the appendix to the *Hamm* petition at p. 51a.

STATUTE INVOLVED

N.J. Stat. Ann. § 39:4-50 (West 1990)

Operating or allowing operation by person under influence of liquor or drugs; penalties; alcohol education or rehabilitation; collection of driver's license; rights of discovery; intoxicated driver resource centers

(a) A person who operates a motor vehicle while under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug, or operates a motor vehicle with a blood alcohol concentration of 0.10% or more by weight of alcohol in the defendant's blood shall . . . be subject:

* * *

(3) For a third or subsequent violation, a person shall be subject to a fine of $1,000.00, and shall be sentenced to imprisonment for a term of not less than 180 days, except that the court may lower such term for each day, not exceeding 90 days, served performing community service in such form and on such terms as the court shall deem appropriate under the circumstances and shall thereafter forfeit his right to operate a motor vehicle over the highways of this State for 10 years.

* * *

A court that imposes a term of imprisonment under this section may sentence the person so convicted to the county jail, to the workhouse of the county wherein the offense was committed, to an inpatient rehabilitation pro-

gram or to an Intoxicated Driver Resource Center or other facility approved by the Director of the Division of Alcoholism in the Department of Health; provided that for a third or subsequent offense a person shall not serve a term of imprisonment at an Intoxicated Driver Resource Center as provided in subsection (f).

* * *

(b) A person convicted under this section must satisfy the screening, evaluation, [referral and program] (referral, program and fee)[1] requirements of the Division of Alcoholism's [Bureau of Alcohol Countermeasures] (Intoxicated Driving Programs Unit), and of the Intoxicated Driver Resource Centers and a program of alcohol education and highway safety, as prescribed by the Director of the Division of Motor Vehicles. The sentencing court shall inform the person convicted that failure to satisfy such requirements shall result in a mandatory two day term of imprisonment in a county jail and a driver license revocation or suspension and continuation of revocation or suspension until such requirements are satisfied, unless stayed by court order in accordance with Rule

[1] This statute was last amended by 1986 N.J. Laws, c. 126, § 1 (effective October 9, 1986). The bracketed material reflects the statute, before the 1986 amendment, as it read on August 10, 1986, when petitioner Hamm committed his offense. The material in parentheses is the amended statutory language in effect on May 15, 1988, when petitioner Iannacone committed his offense.

7:8-2 of the N. J. Court Rules, 1969, or R.S. 39:5-22. Upon sentencing, the court shall forward to the Bureau of Alcohol Countermeasures (within the Intoxicated Driving Programs Unit) a copy of a person's conviction record. A fee of [$40.00] ($80.00) shall be payable to the Alcohol Education, Rehabilitation and Enforcement Fund established pursuant to section 3, P.L.1983, c. 531 (C.26:2B-32) to support the [Bureau of Alcohol Countermeasures, to defray the cost of screening, evaluation and alcohol education programs in the Intoxicated Driver Resource Centers] (Intoxicated Driving Programs Unit).

(c) Upon conviction of a violation of this section, the court shall collect forthwith the New Jersey driver's license or licenses of the person so convicted and forward such license or licenses to the Director of the Division of Motor Vehicles. The court shall inform the person convicted that if he is convicted of personally operating a motor vehicle during the period of license suspension imposed pursuant to subsection (a) of this section, he shall, upon conviction, be subject to the penalties established in R.S. 39:3-40.

* * *

Upon conviction of a violation of this section, the court shall notify the person convicted, orally and in writing, of the penalties for a second, third, or subsequent violation of this section.

* * *

(d) The Director of the Division of Motor Vehicles shall promulgate rules and regulations pursuant to the "Administrative Procedure Act," P.L. 1968, c.410 (C. 52:14B-1 et seq.) in order to establish a program of alcohol education and highway safety, as prescribed by this act.

(e) Any person accused of a violation of this section who is liable to punishment imposed by this section as a second or subsequent offender shall be entitled to the same rights of discovery as allowed defendants pursuant to the Rules Governing Criminal Practice, as set forth in the Rules Governing the Courts of the State of New Jersey.

(f) The counties, in cooperation with the Division of Alcoholism and the Division of Motor Vehicles, but subject to the approval of the Division of Alcoholism, shall designate and establish on a county or regional basis Intoxicated Driver Resource Centers. These centers shall be have the capability of serving as community treatment referral centers and as court monitors of a person's compliance with the ordered treatment, service alternative or community service. All centers established pursuant to this subsection shall be administered by a certified alcoholism counsellor or other professional with a minimum of five years' experience in treatment of alcoholism. All centers shall be required to develop individualized treatment plans for all

persons attending the center; provided that the duration of any ordered treatment or referral shall not exceed one year. It shall be the center's responsibility to establish networks with the community alcohol education, treatment and rehabilitation resources and to receive monthly reports from the referral agencies regarding a person's participation and compliance with the program. Nothing in this subsection shall bar these centers from developing their own education and treatment programs; provided that they are approved by the Division of Alcoholism.

Upon a person's failure to report to the initial screening or any subsequent ordered referral, the Intoxicated Driver Resource Center shall promptly notify the sentencing court of the person's failure to comply.

Required detention periods at the Intoxicated Driver Resource Centers shall be determined according to the individual treatment classification assigned by the Bureau of Alcohol Countermeasures. Upon attendance at an Intoxicated Driver Resource Center, a person shall be assessed a per diem [charge of $25.00 to be collected by the center and used to defray costs] (fee of $50.00 for the first offender program or a per diem fee of $75.00 for the seconder offender program, as appropriate).

The centers shall conduct a program of alcohol education and highway safety, as prescribed by the Director of the Division of Motor Vehicles.

> The Director of the Division of Alcoholism shall adopt rules and regulations pursuant to the "Administrative Procedure Act," P. L. 1968, c. 410 (C. 52:14B-1 et seq.), in order to effectuate the purposes of this subsection.

COURT RULE INVOLVED

SUP. CT. R. 13.1

> A petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort . . . shall be deemed in time when it is filed with the Clerk of this Court within 90 days after the entry of the judgment. . . .

STATEMENT OF THE CASE

These cases involve state defendants who were each convicted of driving while intoxicated, in violation of N.J. Stat. Ann. § 39:4-50, after a request for a jury trial was denied, and whose claims were ultimately rejected by the reviewing state courts.

The mandatory consequences for a conviction under N.J. Stat. Ann. § 39:4-50 as a third offender are a $1000 fine, a term of imprisonment of 180 days,[2] a

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[2] The state courts have recognized that the statutory language, "a term not less than 180 days," N.J. Stat. Ann. § 39:4-50(a)(3), was "not well chosen," *State v. Linnehan*, 197 N.J. Super. 41, 43, 484 A.2d 34, 35 (App. Div. 1984), *certif. denied*, 99 N.J. 236, 491 A.2d 723 (1985), but have construed the language as not authorizing a maximum sentence exceeding 180 days. (*Hamm* pet. at p. 19a); *State v. Ferretti*, 189 N.J. Super. 578, 581-82, 461 A.2d 193, 195 (Law Div.), *certif. denied*, 94 N.J. 606 (1983). According to *Ferretti*, the language prescribes a mandatory sen-

ten-year license revocation, a $100 surcharge fee (pursuant to N.J. Stat. Ann. § 39:4-50.8 (West 1990), completion of program requirements of the Division of Alcoholism's Intoxicated Driving Programs Unit and an alcohol education and highway safety program, and payment of a fee, either $80 as for petitioner Iannacone or $40 for petitioner Hamm, payable to the Alcohol Education, Rehabilitation and Enforcement Fund. N.J. Stat. Ann. § 39:4-50(a)(3). Automobile insurance surcharges of $1000 per year for three years (or not less than $1500 per year if the third or subsequent DWI conviction occurs within three years of prior DWI conviction) are also incurred. N.J. Stat. Ann. § 17:29A-35b.(2) (West 1985 & Supp. 1990).

Petitioner Iannacone was convicted at a bench trial in the Monroe Municipal Court of driving while intoxicated pursuant to N.J. Stat. Ann. § 39:4-50. He was sentenced as a third offender to a jail term of 90 days, which may be served in an inpatient alcohol treatment program, and 90 days of community service and was ordered to pay a $1000 fine, $100 DMV surcharge and $15 court costs; his driver's license was revoked for ten years. (Trans. of December 6, 1988, at T89-13 to 17). The conviction and sentence were upheld through the various levels of appeal afforded

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tence of 180 days, subject to reduction for community service. *Ibid. Accord, State v. Linnehan*, 197 N.J. Super. at 43, 484 A.2d at 35. Moreover, the incarceration component of the sentence may be reduced by up to 90 days for a comparable amount of community service and the remainder may be served at a county jail or workhouse or at an inpatient rehabilitation program, N.J. Stat. Ann. § 39:4-50(a)(3); if an offender is sentenced to an inpatient rehabilitation program, the court is empowered to release the offender to an outpatient program for the duration of the sentence. N.J. Stat. Ann. § 39:4-51.

petitioner. (Trans. of January 27, 1989, at T3-13 to 21, T5-5 to 11: *Iannacone* pet. at pp. 24a to 32a, 33a).

Petitioner Hamm entered a conditional plea of guilty to a violation of N.J. Stat. Ann. § 39:4-50, preserving for appellate review the denial of his application for a jury trial. N.J. Ct. R. 3:9-3(f). (Trans. of Oct. and Nov. 1987 municipal court proceedings, at T283-24 to 285-8). The municipal court dealt with the mandatory statutory penalties by suspending the 180-day term of imprisonment conditioned upon completion of a 30-day inpatient rehabilitation program, and a 60-day supervised outpatient program, imposing 90 days of community service, and ordering the mandatory ten-year license revocation. (*Id.* at T393-12 to 394-12). The court also assessed a $1000 fine, $15 for court costs, and the $100 surcharge fee. (*Id.* at T393-7 to 11). Petitioner Hamm's conviction and sentence were also upheld through the state courts (trans. of Feb. 11, 1988, at T14-3 to 7, T16-20 to 17-6; Hamm pet. at pp. 24a to 26a, 1a to 23a), culminating in the decision by the Supreme Court of New Jersey on August 6, 1990)[3] in *State v. Hamm*. (*Hamm* pet. at pp. 1a to 23a).

In *State v. Hamm*, the state supreme court held under *Blanton v. City of North Las Vegas*, 489 U.S. 538, 109 S. Ct. 1289 (1989), that "the statutory penalties for DWI are not so severe as to clearly reflect a legislative determination of a constitutionally 'se-

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[3] On January 12, 1990, the state supreme court stayed all DWI appeals in which the jury trial issue was raised pending resolution of *State v. Hamm*, et al. On August 6, 1990, the Supreme Court rendered its opinion and on September 5, 1990, the court denied petitioner Iannacone's request for discretionary review. (*Iannacone* pet. at p. 33a).

rious' offense requiring jury trial." (*Hamm* pet. at p. 2a). According to the supreme court, the DWI offense is not regarded as a criminal offense under the laws of New Jersey and the state legislature has never evidenced any intent to treat DWI offenses as indictable offenses for which a jury trial is required. *Id.* at pp. 2a, 10a to 11a, 14a. Rather, the state legislature has treated the offense as a "profound social problem" and legislatively encouraged rehabilitative and community service alternatives to incarceration. *Id.* at p. 21a. The "legislative and judicial history of DWI in New Jersey shows both its consistent treatment as a non-criminal offense and progressive legislative emphasis upon rehabilitation and prevention rather than punishment." (*Id.*).

According to the supreme court, all DWI penalties other than the 180 day imprisonment and the $1000 fine are *civil* rather than criminal penalties. *Id.* at pp. 9a to 10a. These civil penalties do not serve to create "the rare situation where a legislature packs an offense it deems 'serious' with onerous penalties that nonetheless 'do not puncture the 6-month incarceration line.' " (citing from *Blanton v. City of North Las Vegas*, 109 S. Ct. at 1293). (*Hamm* pet. at p. 17a). While acknowledging that a license to drive is a necessity and that under state law "substantial loss of driving privileges" is a "consequence of magnitude," *Rodriguez v. Rosenblatt*, 58 N.J. 281, 285, 277 A.2d 216, 223 (1971), the supreme court recognized that other more valued licenses, professional and business, are subject to loss upon only notice and a fair hearing. *Id.* at p. 17a. The license revocation serves both precautionary and penal purposes. *Id.* at p. 21a.

The court further determined that the other civil penalties and administrative sanctions also do not create a right to jury trial under *Blanton*. The rehabilitation and enforcement surcharges are reasonable and increased insurance premiums easily may result from conduct never criminally prosecuted. *Id.* at pp. 17a to 18a. Moreover, there are limited collateral consequences; other than the license suspension, "[n]o other loss of privilege, franchise, or right of citizenship flows from a DWI conviction." *Id.* at pp. 21a. The supreme court accordingly determined that the criteria set forth in *Blanton* for determining whether an offense is so serious that an individual charged thereunder is entitled to a jury trial were not violated. *Id.* at pp. 22a to 23a.

SUMMARY OF ARGUMENT

It is respondent's procedural position that the Hamm petition should not even be considered by this Court because it was untimely filed in clear violation of the rules of this Court. Respondent's substantive position as to both petitions is that the state supreme court correctly applied the *Blanton* principles to the statutory provision at issue, N.J. Stat. Ann. § 39:4-50. The history and development of the New Jersey DWI laws reflect a legislative determination that DWI is a non-criminal societal problem profoundly affecting public safety to be dealt with preferably by prevention, reparation, education and rehabilitation rather than punishment. Because resolution of the issue requires an analysis of the unique state statutory scheme in its historical perspective, the case does not have any consequential value beyond New Jersey. Moreover, there is clearly no split among the circuits as

to how *Blanton* is to be interpreted. Nor has there been a showing, based upon court decisions construing similar or nearly identical statutes in the same historical context, that the Supreme Court of New Jersey has incorrectly interpreted *Blanton*. Further, only a misconstruction of the state statute could produce the conclusion that a third DWI offender is subject upon conviction to a prison term of 182 days, which in any event remains quantitatively insufficient to vitiate the presumption that offenses are considered petty where the maximum authorized incarceration is six months or less. Finally, the issue referred to in *Blanton v. City of North Las Vegas*, 109 S. Ct. at 1294 n.12, is not implicated herein, as it was not presented in the state courts.

REASONS WHY THE PETITIONS SHOULD BE DENIED

1. The *Hamm* petition should not be considered by this Court as it was filed out of time in violation of Sup. Ct. R. 13.1

Final judgment in *State v. Hamm* was entered in the state courts on August 6, 1990, when the Supreme Court of New Jersey issued its opinion. (*Hamm* pet. at p. 1a). Accordingly, the petition for a writ of *certiorari* must have been filed within 90 days of the judgment, or November 5, 1990 (November 4, 1990, the ninetieth day, being a Sunday). Sup. Ct. R. 13.1; 28 U.S.C.A. § 2101(d). It was not filed until November 6, 1990, and is untimely. DWI proceedings are characterized as "quasi-criminal" because they do not involve "crimes," *State v. Laird*, 25 N.J. 298, 303, 135 A.2d 859, 862 (1957); the classification refers to the fact that most of the constitutional safeguards of a criminal proceeding are operative in these proceed-

ings. *Ibid.* A conviction, however, implicates liberty concerns and respondent would not argue that the case is "civil," rather than "criminal," for purposes of characterizing the proceeding herein in the context of this Court's jurisdiction. *Cf.* 28 U.S.C.A. § 2101(c).

2. The state supreme court properly concluded under *Blanton v. City of North Las Vegas*, 489 U.S. 538, 109 S. Ct. 1289 (1989), and other pertinent Sixth Amendment analysis, that the penalties for violating the DWI law as a third offender, *see* N.J. Stat. Ann. § 39:4-50(a)(3), do not reflect a legislative determination that the offense is serious and hence entitles a person so charged to a jury trial; the proper focus necessarily is on the unique state statutory scheme in the context of its historical development and legislative perspective that does not have any far-reaching importance beyond the state of New Jersey.

In *Blanton v. City of North Las Vegas*, 489 U.S. 538, 109 S. Ct. 1289, this Court considered the legislature's fixing of the maximum authorized penalty as the critical indicator of the seriousness of the offense. *Blanton*, 109 S. Ct. at 1292. Incarceration, "an 'intrinsically different' form of punishment" (quoting *Muniz v. Hoffman*, 422 U.S. 454, 477 (1975)), is the "most powerful" sign of seriousness. *Ibid.* Hence, a maximum authorized prison sentence of six months or less creates a presumption that the legislature views the offense as petty. *Ibid.* In the "rare" situation where the legislature has provided for "onerous" penalties as an indication of the seriousness with which it views the offense but does not authorize a term of incarceration exceeding six months, a defendant is entitled to a jury trial only if he is able to demonstrate

> that any additional statutory penalties viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a "serious" one.

Ibid. The judiciary, however, must refrain from substituting its judgment as to seriousness for that of the legislature. *Ibid.*

"

The New Jersey state courts have consistently viewed motor vehicle violations, necessarily including drunk driving, not as "crimes," but as "petty" offenses—handled in the municipal courts as "quasi-criminal" matters "to satisfy the requirements of fundamental fairness and essential justice to the accused," *Vickey v. Nessler*, 230 N.J. Super. 141, 149, 553 A.2d 34, 38 (App. Div.), *certif. denied*, 117 N.J. 74, 563 A.2d 836 (1989)—which do not invoke constitutional guarantees of indictment or a right to jury trial. *State v. DeLuca*, 108 N.J. 98, 111, 527 A.2d 1355, 1361-62, *cert. denied*, 484 U.S. 944 (1987); *State v. Dively*, 92 N.J. 573, 585, 458 A.2d 502, 508 (1983); *State v. Tropea*, 78 N.J. 309, 314, 394 A.2d 355, 357 (1978); *State v. Macuk*, 57 N.J. 1, 9-10, 268 A.2d 1, 5-6 (1970); *Clark v. New Jersey Division of Motor Vehicles*, 211 N.J. Super. 708, 711, 512 A.2d 588, 589 (App. Div. 1986); *State v. Linnehan*, 197 N.J. Super. at 43-44, 484 A.2d at 35; *State v. Zoppi*, 196 N.J. Super. 596, 483 A.2d 844 (Law Div. 1984); *State v. Ferretti*, 189 N.J. Super. at 582-83, 461 A.2d at 194-95.

Similarly, by fixing the penalties that it did, the state legislature undoubtedly intended that drunk driving prosecutions remain outside the realm of jury

trials. N.J. Stat. Ann. § 2C:1-4a and b provide that offenses embodying maximum terms of incarceration of six months or less are "petty" and neither invoke a right to indictment or jury trial nor, upon conviction, "give rise to any disability or legal disadvantage based upon conviction of a crime." Final Report of the New Jersey Criminal Law Revision Commission, *The New Jersey Penal Code Volume II: Commentary* (1971), at 9-10. Hence, petitioner Hamm's assertion with respect to expungement (pet. at p. 13) is simply not pertinent for two reasons. Except for the ten-year license revocation, "[n]o other loss of privilege, franchise, or right of citizenship flows from a DWI conviction." (*Hamm* pet. at p. 21a). Also, if ten years have elapsed between the first and second, and second and third, DWI convictions, the court must sentence a second offender and a third offender as if they were, respectively, first and second offenders. N.J. Stat. Ann. § 39:4-50(a)(3). (*See Hamm* pet. at p. 19a).

Moreover, that the state legislature has characterized penalties for convicted second and third offenders as "severe" when it extended discovery procedures to these prosecutions, see L. 1982, c. 58; N. J. Senate Law, Public Safety and Defense Committee Statement, Assembly, No. 796 (L. 1982, c. 58), does not render the offense "serious" in the constitutional sense for purposes of invoking a right to jury trial. Indeed, the amendment reflects that the legislature obviously intended for these prosecutions to remain in municipal court, where jury trials cannot be had.

Both the state legislature and the state judiciary view drunk driving as a "societal dilemma" best dealt with by "eliminat[ing] intoxicated drivers from the roadways of this State." *State v. Tischio*, 107 N.J.

504, 514, 527 A.2d 388, 393 (1987), *appeal dismissed*, 484 U.S. 1038 (1988); *State v. Dyal*, 97 N.J. 229, 237, 478 A.2d 390, 394 (1984) (public policy of New Jersey is to "rid the highway of drunken drivers."); *see State v. Mulcahy*, 107 N.J. 467, 479, 527 A.2d 368, 374 (1987) (prevention of accidents motivating force behind drunk driving legislation); *see also In re Kallen*, 92 N.J. 14, 29, 455 A.2d 460, 467-68 (1983) (purpose of Implied Consent Law providing for license suspension upon refusal to take chemical breath test "is not to punish the driver but to protect the motoring public by removing the offending driver from the highways with reasonable dispatch.").

A discerning review of the penalty provisions of the current state statutory scheme reflects this legislative emphasis on protection of the public, education, alcoholism treatment, rehabilitation and personal and public awareness. It allows courts to fashion, as they did in these cases, a sentence emphasizing alcohol rehabilitation for a convicted third offender. At the same time it authorizes the courts to protect the public by precluding legal driving by one whose alcohol rehabilitation will, in all probability, require a lengthy period of time.

Convicted third offenders are subject to a maximum term of imprisonment of 180 days. N.J. Stat. Ann. § 39:4-50(a)(3). (*See Hamm* pet. at p. 19a). As noted, however, *supra*, n.2, courts are permitted to fashion a sentence, similar to the sentences imposed upon petitioners, wherein the third offender suffers no imprisonment; rather, the 180-day requirement may be satisfied by a sentence splitting the days between performance of community service and participation in an inpatient alcohol rehabilitation program, release

from which to an outpatient program is available after approximately 30 days. N.J. Stat. Ann. § 39:4-51.

While under state law a fine "is intended to punish," *State v. De Bonis*, 58 N.J. 182, 192, 276 A.2d 137, 142 (1971); *accord, State in the Interest of D.G.W.*, 70 N.J. 488, 495, 361 A.2d 513, 516 (1976) ("Fines are essentially punitive in nature . . . . "), hefty fines and surcharges may be, and frequently are, imposed in administrative proceedings—after proof by a standard of less than a reasonable doubt. "[I]mprisonment and fines are intrinsically different." *Muniz v. Hoffman*, 422 U.S. at 477; *State v. Zoppi*, 196 N.J. Super. at 600, 483 A.2d at 846. Indeed, the only fine mandated by N.J. Stat. Ann. § 39:4-50(a)(3) is far below the $5000 level set by Congress as the maximum fine for an individual convicted of a class B misdemeanor which subjects him to imprisonment not exceeding six months. 18 U.S.C.A. § 3559(a)(7) (West Supp. 1990); 18 U.S.C.A. § 3571(b)(6) (West Supp. 1990). Moreover, "costs" are not considered to be punitive in New Jersey. *State v. De Bonis*, 58 N.J. at 200-01, 276 A.2d at 147.

Third offenders are required to satisfy the screening, evaluation, referral, program and fee requirements of the Division of Alcoholism's Bureau of Alcohol Countermeasures, and of the Intoxicated Driver Resource Centers. N.J. Stat. Ann. § 39:4-50(b). The evaluation and program for third offenders necessarily focuses upon rehabilitation and education. The $40 or $80 fee is compensatory, in that it defrays the cost involved. N.J. Stat. Ann. § 39:4-50(b). Similarly, the $100 surcharge, $5 of which is used for administrative expenses and $95 of which is earmarked for the "Drunk Driving Enforcement Fund," which is

used to establish a statewide drunk driving enforcement program, is *de minimis* and compensatory. N.J. Stat. Ann. § 39:4-50.8. Municipalities and law enforcement agencies are entitled to grants from the Fund to increase law enforcement efforts with respect to N.J. Stat. Ann. § 39:4-50. *Ibid.*; *see* N.J. Assembly, No. 828—L. 1984, c. 4 (Introductory Statement).

Too, the insurance surcharges set forth in N.J. Stat. Ann. § 17:29A-35b(2) are civil. "The insurance surcharge is a burden on the [driving] privilege. Similar to a fine it does not involve that deprivation of freedom which lies at the heart of the jury trial requirement." *State v. Zoppi*, 196 N.J. Super. at 601-02, 483 A.2d at 846; see *Clark v. New Jersey Division of Motor Vehicles*, 211 N.J. Super. at 710-11, 512 A.2d at 589 (rejecting contention that automobile surcharges upon drunk driving conviction are "penal" and characterizing them as remedial and civil). Insurance surcharges necessarily are incurred only if the convicted DWI offender chooses to continue to drive once his license is restored. Indeed, the surcharges can be characterized as remedial because the surcharges compensate the New Jersey Automobile Full Insurance Underwriting Association for underwriting losses. N.J. Senate Labor, Industry and Professions Committee Statement, Assembly, No. 1696—L.1983, c.65, *reprinted after* N.J. Stat. Ann. § 17:29A-33 (West 1985); *Matter of Johnson*, 226 N.J. Super. 1, 543 A.2d 454 (App. Div. 1988) (purpose of surcharge is to compel high risk driver to bear added insurance cost of his poor driving).

Moreover, license forfeiture is a civil and remedial penalty. It has been recognized, of course, that a driver's license in modern society is of "vital signif-

icance and value" to its owner, and hence, may not be taken away without due process. *Bechler v. Parsekian*, 36 N.J. 242, 256-57, 176 A.2d 470, 478-79 (1961); *accord Bell v. Burson*, 402 U.S. 535, 539 (1971). The New Jersey Division of Motor Vehicles, however, has traditionally held the power to suspend or revoke drivers licenses and, indeed, until January 12, 1982, authority to revoke licenses for refusal to submit to a chemical test rested exclusively in the Director of the Division of Motor Vehicles. *See* New Jersey L. 1966, c. 142, sec. 4, as amended by L. 1977, c. 29, sec. 4. Effective January 1982, the municipal court undertook the refusal proceedings as purely "an efficacious means of disposing of all issues related to the drunk driving law in the most convenient forum." N.J. Senate Judiciary Committee Statement, Assembly, No. 2293 (May 14, 1981); *In re Kallen*, 92 N.J. at 21 n.2, 455 A.2d at 463 n.2; *State v. Fahrer*, 212 N.J. Super. 571, 576, 515 A.2d 1240, 1244 (App. Div. 1986) (license revocation upon refusal to take chemical test remains "civil" in nature). License forfeiture can be characterized as remedial in that it allows convicted DWI offenders to repay society by staying off the roads until, at a minimum, undoubtedly lengthy alcohol rehabilitation occurred. Further, as the state supreme court recognized, forfeiture of licenses of even greater value than a license to drive has been ordered in proceedings in which no entitlement to a jury trial exists and for which the burden of proof is less than the reasonable doubt standard. *See, e.g., Steadman v. Securities and Exchange Commission*, 450 U.S. 91 (1981) (preponderance of evidence standard properly applied in administrative hearing resulting in order permanently

banning investment advisor from practicing his profession).

Accordingly, the state supreme court's opinion is consistent with the analysis set forth by this Court in *Blanton* that refused to establish a "bright-line" six month rule simply to avoid the inadvertent sanctioning of the admittedly rare situation where a state legislative body has transgressed the "constitutional limits beyond which the States may not go in this regard," *Patterson v. New York*, 432 U.S. 197, 210 (1977), that is, where the state legislature, deeming an offense serious enough to warrant onerous punitive sanctions, nevertheless retains a maximum statutory incarceration not exceeding six months. Indeed, in *Blanton*, this Court discounted all consequences of the drunk driving convictions, except for the term of imprisonment, as either *de minimis* or not of sufficient constitutional weight to factor heavily into the right to jury trial determination.

Moreover, as the *Blanton* analysis necessarily depends upon the state's binding interpretation of its laws in their historical and sociological evolvement, *see Mullaney v. Wilbur*, 421 U.S. 684, 690-91 (1975); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981); *Splawn v. California*, 431 U.S. 595, 600-01 (1977), this case is not appropriate for *certiorari* as it involves a unique state statutory scheme and perspective of consequence only to New Jersey. For this reason, petitioners' reliance upon practices in other states is unavailing and could be misleading.[4]

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[4] For example, many states have potential maximum incarceration penalties for DWI offenses exceeding six months and hence have been constitutionally required to provide jury trials.

Hence, respondent urges that the petitions should be denied.

Ala. Code § 32-5A-191 (imprisonment in county or municipal jail for not more than one year); Alaska Stat. § 28.35.030 and § 12.55.135(a) (DWI, a class A misdemeanor, subjects convicted offenders to term of imprisonment of not more than one year); Ark. Stat. Ann. § 5-65-103 and § 5-65-111 (DWI first offender subject to minimum of 24 hours and maximum of one year imprisonment, DWI second offender (within three years of first offense) subject to minimum of seven days and maximum of one year imprisonment, DWI second offender (within three years) subject to minimum of 90 days to maximum of one year imprisonment, DWI fourth or subsequent offender (within three years) subject to minimum of one year and maximum of six years imprisonment); Colo. Rev. Stat. § 42-4-1202 (imprisonment in county jail for not less than five days nor more than one year); Ga. Code Ann. § 40-6-391 (DWI first offender subject to minimum of ten days and maximum of one year imprisonment, DWI second offender (within five years) subject to minimum of 90 days and maximum of one year imprisonment); Ill. Ann. Stat. Ch. 95½, § 11-501 and Ch. 38, §§ 1005-8-1(7), 1005-8-3(a)(1) (DWI is Class A misdemeanor subjecting first offender to any term less than one year; DWI is Class 4 felony subjecting third or subsequent offender to minimum of one year and maximum of three years imprisonment); Ind. Code. Ann. § 9-11-2-2 and § 35-50-3-2 (DWI is class A misdemeanor subjecting convicted offender to imprisonment for not more than one year); Iowa Code § 321J.2 (third and subsequent DWI offenses subject convicted individual to county jail term of not less than 30 days nor more than one year); Mass. Ann. Laws ch. 90, § 24 (DWI first offender subject to imprisonment for not more than two years, second offender subject to imprisonment for not less than 14 days nor more than two years, third offender subject to imprisonment for not less than 90 days nor more than two years; fourth offender subject to imprisonment for not less than six months nor more than two years); N.Y. Veh. & Traf. Law § 1192 and § 1193 (DWI first offender subject to imprisonment in penitentiary or county jail for not more than one year); Okla. Stat. tit. 47, § 11-902 (first DWI offense subjects individual to jail term of not less

3. Petitioner Hamm is incorrect when he asserts that his actual incarceration exposure is 182 days.

Petitioner Hamm's allegation that the "actual exposure" of a third offender is 180 days plus two days because a failure to satisfy program requirements, *see, e.g., N.J. Admin. Code* tit. 8, §§ 66A-4.1 *et seq.*, results in a mandatory two day county jail term, N.J. Stat. Ann. § 39:4-50(b), is without merit because the avoidance of noncompliance consequences is totally within his control, just as consequences for willful non-payment of a fine would be in petitioner's control. Moreover, the reality is that even 182 days is quantitatively insufficient to remove DWI from the presumption that a maximum custodial exposure of *six months* or less renders an offense "petty" for purposes of the Sixth Amendment. *Blanton*, 109 S. Ct. at 1293.

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than ten days nor more than one year, second or subsequent DWI offense within ten years subjects individual to Department of Corrections for term not less than one year nor more than five years); Or. Rev. Stat. § 813.010, § 161.615 (DWI is Class A misdemeanor for which maximum sentence is one year); R.I. Gen. Laws § 31-27-2 (first DWI offender subject to imprisonment for up to one year, second violation within five years subjects offender to jail term of not less than ten days nor more than one year); S. D. Codified Laws Ann. § 32-23-2, § 22-6-2 (first DWI offense in Class 1 misdemeanor for which county jail term of one year is authorized); Tenn. Code. Ann. § 55-10-403 (first offenders subject to confinement in county jail or workhouse for not less than forty-eight hours nor more than eleven months and twenty-nine days; second offenders subject to similar confinement for not less than forty-five days nor more than eleven months and twenty-nine days; third or subsequent offenders subject to confinement for not less than 120 days nor more than eleven months and twenty-nine days).

4. The issue referred to in footnote 12 of *Blanton v. City of North Las Vegas*, 109 S. Ct. at 1294, is not cognizable herein, as it was never raised specifically and as a federal constitutional question in the state courts.

This Court is foreclosed from addressing this issue in this case because the claim was never raised, let alone "adequately presented in the state system." *Webb v. Webb*, 451 U.S. 493, 496-97 (1981).

5. There is no post-*Blanton* split in the circuits.

For his assertion of a "split" in the circuits petitioner Hamm relies upon *Landry v. Hoepfner*, 840 F.2d 1201 (5th Cir. 1988) (en banc), *cert. denied*, 109 S. Ct. 1540 (1989), and *Richter v. Fairbanks*, 903 F.2d 1202 (8th Cir. 1990). Obviously, only *Richter* is a post-*Blanton* decision, notwithstanding that this Court denied *certiorari* in *Landry* two weeks after the *Blanton* decision.

Indeed, respondent submits that other post-*Blanton* cases decided on a Sixth Amendment basis are not inconsistent with the result reached in New Jersey. *United States v. Twentieth Century Fox Film Corporation*, 882 F.2d 662 (2d Cir. 1989) (corporation being prosecuted for criminal contempt is entitled to jury trial once fine exceeds $100,000); *United States v. Garner*, 874 F.2d 1510 (11th Cir. 1989) (Florida penalties for first offense DUI—term of imprisonment not exceeding six months, fine of $250 to $500, mandatory attendance at a substance abuse program, a mandatory term of probation not exceeding one year, conditioned on 50 hours of community service, and mandatory license suspension for 180 days to one year—do not render defendant's offense "sufficiently serious" to entitle him to a jury trial); *United States*

v. Musser, 873 F.2d 1513, *rehearing denied in per curiam opinion*, 883 F.2d 84 (D.C. Cir.), *cert. denied*, 110 S. Ct. 518 (1989) (maximum sentence upon conviction for unattended sign violations in national park—imprisonment not exceeding six months and/or $500 fine—does not trigger right to jury trial); *Stevenson v. District of Columbia*, 562 A.2d 623 (D.C. App. 1989) (rejecting contention that legislative history's characterization of DUI as "serious" is sufficient for constitutional purposes to trigger a right to jury trial when at the same time the code penalties were reduced so as not to exceed the statutory threshold of 90 days imprisonment and/or a $300 fine).

CONCLUSION

Respondent submits that the petitions for *certiorari* must be denied because the state court rulings do not contravene the legal principles set forth in *Blanton v. City of North Las Vegas*, 109 S. Ct. 1289, because the resolution of the issue necessarily involved the state court's interpretation of New Jersey's DWI law in its unique historical context and a decision by this Court would not supplement meaningfully Sixth Amendment jurisprudence or have any widespread significance and, finally, because there is no significant, if any, split in the circuits which would warrant this Court's consideration.

Respectfully submitted,

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ON THE BRIEF

DATED: March 11, 1991